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No. 82-822

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

FORT PIERCE UTILITIES AUTHORITY, et al.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FORMER FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners, Florida Cities, have requested that this Court grant certiorari and overturn the Former Fifth Circuit's denial of a motion to vacate as moot a case below that had been settled by all parties. Under United States v. Munsingwear, Inc., 340

U.S. 36, 39-40 (1950) quoting Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936), it is "the duty of the appellate court" to vacate a judgment which has become moot as a result of settlement before judicial review is complete.

The FERC agrees "that the underlying controversy in these dockets is moot." (Pet. App., A-82); FERC Memorandum, pp. 3, 4. However, the Solicitor General suggests that the fact that the Former Fifth Circuit had already issued its mandate when the parties moved to vacate may have removed its "obligation to recall its mandate in order to act favorably on the motion to vacate." Id., pp. 3-4.

In an amicus pleading, the Potomac Electric Power Company ("PEPCO") states that the Former Fifth Circuit acted correctly in refusing to vacate, contending that once the mandate below had issued, petitioners' remedy

to obtain vacation of the case below was to "have moved this Court [to] vacate the appellate court's decision within the time permitted for a petition for a writ of certiorari." PEPCO Brief, pp. 6-7.

I. PRESERVATION OF THIS COURT'S RESOURCES AND PROPER JUDICIAL PROCESS DICTATE THAT MOTIONS TO VACATE BE FILED WITH THE COURTS BELOW SUBJECT TO THIS COURT'S CERTIORARI REVIEW

Florida Cities' and FPL's Motion to Vacate the judgment in Flordia Power & Light Company v. Federal Energy Regulatory Commission, 660 F.2d 668 (5th Cir. 1981) was properly filed with the Former Fifth Circuit rather than before this Court. In Munsingwear itself, the Court refused to order vacation because such motion had not been made in the court below:

> In this case the [petitioner] United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.

> Denial of a motion to vacate could bring the case here. Our supervisory power over the judgments of the lower federal courts is a broad one. See 28 U.S.C. §2106, 62 Stat. 963; United States v. Hamburg-American Co., 239 U.S. 466, 478 [1916]; Walling v. Reuter Co., 321 U.S. 671, 676-677 [1944] ...
>
> The case is therefore one where the [petitioner] United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself.

340 U.S. at 40-41. Far from committing procedural error, the parties were required to seek relief in the Former Fifth Circuit before coming here.

The alternative policy argued for by PEPCO would require parties to petition for certiorari on the merits and then move to vacate in this Court. Such requirement could only needlessly add to the workload of the Supreme Court without creating any offsetting benefit. Perhaps more realistically, it would vitiate the Munsingwear doctrine because the Court would not have the time to examine numerous Munsingwear petitions that

could be resolved by the District Courts, Courts of Appeals and agencies below. The further suggestion that it should be necessary for parties who have settled to file petitions for certiorari on the merits is ludicrous. Settlements are entered into to avoid further litigation. 1/

Florida Power & Light Company, petitioner below, and Florida Cities jointly moved that the Former Fifth Circuit vacate its judgment before the time for the filing of a writ of certiorari had run. Absent the settlement of the case, Florida Cities would have filed for

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1/ Florida Cities requested an extension of time to file for certiorari with this Court to permit Federal Energy Regulatory Commission action "in light of the parties' settlement." (Pet. App., A-69, A-71) They did so in specific contemplation that they "would move the Fifth Circuit to vacate its judgment on the ground that the underlying controversy among the parties is moot" and told the Court that the grant of the motion for a time extension "would obviate any need for any party to apply for a writ of certiorari." (Pet. App., A-71)

certiorari on the merits. Acceptance of the arguments of PEPCO could only discourage parties from settling cases. Under PEPCO's theory, parties would no longer have the incentive to enter into a settlement because the very act of settling would make decisions in cases pending appeal binding. Further, as stated above, legal doctrine would become distorted because precedent would be established not as a result of final determinations of cases or controversies but because of the "happenstance" of settlements which preclude parties' further pursuit of their appellate rights. Munsingwear, supra, 340 U.S. at 40.

The Solicitor General and PEPCO suggest that the crucial point is that the mandate of the Former Fifth Circuit had issued at the

time of settlement, although the time in which to petition for certiorari had not yet run. 1/

Rule 41(a) of the Federal Rules of Appellate Procedure provides that unless accelerated or stayed by specific court order, mandates issue automatically 21 days after the entry of judgment. Thus, when cases are settled after decisions below, but before the time for the filing of appeals

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1/ In their Petition for a Writ of Certiorari, Florida Cities state (p. i) that "this case presents no novel question," but that "[t]he failure of the Former Fifth Circuit to comply with applicable precedent of this Court is so clear" that "summary reversal is appropriate in order to protect the integrity of the judicial process." Counsel adheres to this view. In Munsingwear, supra, 340 U.S. at 40, the Supreme Court stressed: "Denial of a motion to vacate could bring the case here." See full quotation at pp. 3-4, supra. However, if the Solicitor General is correct that there is an issue (i.e., the impact of the Former Fifth Circuit's issuance of its mandate under Munsingwear), then this case is worthy of consideration by this Court. Absent clarification, parties and the bar will not know the legal impact of settlements -- or would-be settlements -- pending appeal.

lapses, mandates will often have issued. Contrary to the implications of PEPCO (Brief, pp. 4-6), a court's mandate will normally be stayed due to the filing of a timely rehearing application and can always be recalled to prevent injustice. Fed. R. App. P. 41; 5th Cir. R. 17; Wilkins v. United States, 441 U.S. 468 (1979); Ferrell v. Estelle, 573 F.2d 867, 868, withdrawing opinion, 568 F.2d 1128 (5th Cir. 1978); Savage v. United States, 483 F.2d 67 (5th Cir. 1973), cert. denied, 415 U.S. 949 (1974); Lacaze v. United States, 457 F.2d 1075 (5th Cir.), cert. denied, 409 U.S. 921 (1972); Gradsky v. United States, 376 F.2d 993, 995 (5th Cir. 1967), vacated on other grounds sub nom. Roberts v. United States, 389 U.S. 18, cert. denied, 389 U.S. 908 (1967). Thus, it is beyond question that the Former Fifth Circuit could have granted the parties' motion to vacate as moot, even though the

grant of such motion would have technically involved the recall of its mandate. This is the natural implication of the Munsingwear doctrine.

As the Former Fifth Circuit stated in Dickerson v. Continental Oil Co., 476 F.2d 635, 636 (5th Cir. 1973) (footnote omitted):

> Since terms, as such, no longer exist, this Court has the innate power to recall and then relax its mandate on a proper showing. Meredith v. Fair, 5 Cir., 1962, 306 F.2d 374. The more orderly way is, of course, for the party affected to formally petition this Court .... But in a structure of rules which at every stage envisages the attainment of substantial justice with a minimum of technicalities, there is no insurmountable need for such a formal motion. We can, and as we have before, Bros Inc. v. Davidson, 5 Cir., 1964, 330 F.2d 65, 67, we treat the present appeal as in effect, a post-judgment-post-mandate request.

Accord, National Surety Corp. v. Charles Carter & Co., Inc., 621 F.2d 739, 741 (5th Cir. 1980). 1/ See Cahill v. New York, N.H.

1/ To the extent that PEPCO implies a finality argument, see cases such as United

FOOTNOTE CONTINUED ON NEXT PAGE

& H.R. Co., 351 U.S. 183 (1956).

Here, FPL and Florida Cities filed for vacation of the Former Fifth Circuit's judgment under Munsingwear. If such motion was not sufficient, then the Munsingwear doctrine must be overturned or limited insofar as it directs that motions to vacate be filed with the lower courts. Mandates will often have issued where settlement takes place during the appellate process, but before appeal rights are exhausted. PEPCO itself quotes language from Munsingwear Brief, p. 4), establishing that the vacation due to mootness principle applies not only to a case pending Supreme Court decision on the merits

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States v. Ohio Power Co., 353 U.S. 98, 99 (1957), Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965), and Cahill v. New York, N.H. & H.R. Co., 351 U.S. 183 (1956). These cases establish that the Fifth Circuit was not at liberty to place the interests of finality ahead of other recognized interests.

but also to a case "on its way" to the Supreme Court. Thus, under Munsingwear, supra, the parties had a right to file for vacation and could do so only in the Former Fifth Circuit which, if such motion were properly filed, had the "duty" to grant it. Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979), quoting Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936) (emphasis added by the Court). See also University of Texas System v. Assaf, 435 U.S. 992 (1978), vacating, 557 F.2d 822 (5th Cir. 1977); Board of Regents of the University of Texas System v. New Left Education Project, 414 U.S. 807 (1973), vacating, 472 F.2d 218 (5th Cir. 1973). Compare FERC Memorandum, p. 3.

II. PEPCO'S MOTION FOR LEAVE TO PARTICIPATE AS AMICUS SHOULD BE DENIED

PEPCO asserts a right to participate as amicus. To the extent that it could have

shown a substantive interest in the case below, it could have participated before the FERC or the Court of Appeals on the merits. In fact, it had no such interest. Nor did it ever seek intervention on the merits.

PEPCO's position here illustrates the underlying reason for the Munsingwear doctrine: precedent should not be set based upon cases which have been settled by the parties at interest. PEPCO's approach would result in underlying decisions which stand not as a result of final adjudications, but as a result of parties' failure to appeal because of the fortuity of a settlement. Munsingwear, supra.

As stated, PEPCO neither participated nor had an interest in the case below. The underlying dispute concerned transmission of electricity between and among Florida utilities. PEPCO operates in the Washington, D. C. area, and does not buy, sell or

transmit power in Florida. It had no standing to be a party under the Federal Power Act. That statute provides, "any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order ...", Federal Power Act, Section 313(b), 16 U.S.C. §8251(b) (emphasis added). Nor does it have standing under the Administrative Procedure Act, 5 U.S.C. §701 et seq., or under any other relevant legal authority.

A basic premise of American jurisprudence is that the Court is not a legislature. Jurisdiction is based upon "cases" or "controversies". "[J]udicial power ... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." Muskrat v. United States, 219 U.S. 346, 361 (1911) (emphasis added). PEPCO's interest is no greater than that of any other citizen or

company. Such a general, "purely public" interest is not enough to sustain intervention. Sierra Club v. Morton, 405 U.S. 727 (1972). PEPCO makes plain that its desire to participate here is merely because of its asserted "substantial interest" in the precedent of the holding below. (Motion, p. ii; Brief, p. 2) But while the public at large has an abstract interest in any given case precedent, that interest does not give rise to a right to sue. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974). In short, PEPCO's desire to "rel[y]" (Brief, p. 2) upon the Former Fifth Circuit's decision cannot be divorced from the proceedings below in which it had no interest and which the parties had settled.

While PEPCO would obviously like to provide a rationale for the Fifth Circuit's denial of the Motion to Vacate, which that

Court itself did not provide, its participation cannot add substance to the Court of Appeals' cursory denial of the Motion to Vacate (Pet. App., A-88). The Former Fifth Circuit correctly denied PEPCO the right to participate on the question of vacation due to mootness (Pet. App., A-85) after hearing similar arguments to those which PEPCO makes here.

Respectfully submitted,

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